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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN B. SWAINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 34-46) is reported at 548 F. 2d 657. The order of the district court (Pet. App. 25-31) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. The petition for a writ of certiorari was filed on February 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1623 is the exclusive perjury statute applicable to perjury before grand juries.

2. Whether the preaccusation delay in this case violated the Due Process Clause.

3. Whether conversations between two of petitioner's co-conspirators were properly admitted into evidence under the co-conspirator exception to the hearsay rule.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of perjury, in violation of 18 U.S.C. 1621.[1] He was sentenced to concurrent terms of one year and one day's imprisonment, all but 60 days of which were suspended in favor of unsupervised probation. The court of appeals affirmed.

In 1972, while petitioner was an associate justice of the Supreme Court of Michigan, an intermediate appellate court of Michigan affirmed the conviction of John Whalen for breaking and entering and for larceny. In October 1972, following denials of Whalen's application for leave to appeal and a motion for reconsideration, the Supreme Court of Michigan, at petitioner's instigation, took the extraordinary action of granting Whalen leave to appeal *sua sponte* (App. 138a-139a).[2] On November 16, 1972, a commissioner's recommendation that Whalen's application for bail be denied was held by petitioner for a court conference. On December 21, at petitioner's initiative, bail was granted (App. 145a-148a). Whalen's appeal was argued on October 3, 1973, and on December 18, 1973, the court reversed his conviction and remanded

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[1]At the close of the evidence, the trial court granted petitioner's motion for judgments of acquittal on three counts charging him with use of a facility in interstate commerce to commit bribery and with mail fraud. The jury acquitted petitioner of conspiracy. Petitioner was tried with Harvey Wish, who was acquitted of charges of bribery and mail fraud and convicted of conspiracy (Pet. App. 35).

[2]"App." refers to the two-volume appendix filed by petitioner in the court of appeals.

the case for a new trial. *People* v. *Whalen*, 390 Mich. 672, 213 N.W. 2d 116.

On May 19 and 21, 1975, petitioner appeared before a federal grand jury in the Eastern District of Michigan. The grand jury was investigating allegations that petitioner had accepted a $20,000 bribe from Harvey Wish, a bail bondsman, for his efforts in behalf of Whalen, one of Wish's clients.

On May 19 petitioner testified before the grand jury (1) that he had not discussed Whalen's case with Wish in a telephone conversation on October 6, 1972, or at any other time (App. 48a); (2) that he did not telephone Wish's office on October 19, 1972, and leave a message to the effect that leave for an appeal in Whalen's case had been granted (App. 39a-40a); and (3) that he did not receive a television set or a large carton from Wish on October 15, 1973 (App. 50a). The Assistant United States Attorney then read to petitioner transcripts of the testimony of eyewitnesses to petitioner's receipt of the television set. Petitioner declined to testify further, and the grand jury was recessed.

In his second appearance before the grand jury on May 21, 1975, petitioner admitted (1) that on October 6, 1972, he had spoken with Wish by telephone and that Wish had read him a portion of Whalen's application for leave to appeal; (2) that he had telephoned Wish's office on October 19, 1972, and left a message that Whalen had been granted leave to appeal; and (3) that on October 15, 1973, a large box had been transferred from Wish's car to petitioner's car (App. 61a-62a).

The indictment charged that petitioner's testimony of May 19 was false. At trial petitioner's admissions of May 21 were corroborated by other evidence. On October 6, 1972, in a tape-recorded telephone conversation

between Wish and Whalen, who was then acting as an informant, Wish said (App. 343a-344a): "I read it, he says well I'm going to present it," and "[i]n other words I said it will be presented to the Supreme Court of Michigan on Monday, October 17th." On October 20, 1972, the following exchange between Wish and Whalen was recorded (App. 408a):

> Wish: This is the message he left here yesterday. It is done
>
> Whalen: Beautiful
>
> Wish: Yeah
>
> Wish: An order granting leave to appeal will be entered today. Now he called here this morning * * *.

Petitioner's receipt of the television set on October 15, 1973, was shown by the testimony of a restaurant parking lot attendant who said that on that date, at petitioner's request, he transferred a large box marked "television" from another car to petitioner's car (App. 487a-488a). An agent of the Federal Bureau of Investigation also testified that he observed the box being placed in petitioner's car (App. 469a-471a).

ARGUMENT

1. The general perjury statute under which petitioner was prosecuted, 18 U.S.C. 1621, does not establish recantation as a defense. Another perjury statute, 18 U.S.C. 1623, applicable to false declarations before any federal court or grand jury, provides that when, in the same continuous grand jury proceeding, a person admits a declaration to be false, "such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not

become manifest that such falsity has been or will be exposed." Petitioner's basic contention is that by being prosecuted under Section 1621 he was improperly denied the benefit of this recantation provision of Section 1623.

The foundation of petitioner's argument is that Section 1623, which is addressed explicitly to judicial declarations, should be held to have repealed Section 1621 by implication. But repeals by implication are not favored; whether there has been such a repeal is primarily a question of congressional intent, and petitioner has not pointed to any legislative history of Section 1623 demonstrating an intent to displace Section 1621.[3] Petitioner concedes that the question presented here is one of first impression (Pet. 10), and the only appellate court that has considered the matter has indicated that it would not be inclined to find that Section 1623 is the only statute punishing grand jury perjury. *United States* v. *Kahn*, 472 F. 2d 272 (C.A. 2), certiorari denied, 411 U.S. 982.

Section 1623 was enacted principally in order to remove certain constraints that impeded perjury prosecutions under Section 1621. Thus, Section 1623(c) permits conviction simply upon a showing that the defendant made inconsistent sworn statements in court or grand jury proceedings, without requiring the prosecution to show which of the declarations is false; and Section 1623(e) eliminates the requirement, read into Section 1621 by judicial construction, that perjury be shown by the testimony of at least two witnesses. Although petitioner was denied the benefits of any recantation defense that might have existed,

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[3]Section 1623 was part of the Organized Crime Control Act of 1970. The 1970 statute thoroughly examined the relationship between its new provisions and existing criminal statutes, and numerous of its provisions were expressly stated to repeal or modify earlier statutes. See Pub. L. 91-452, 84 Stat. 922. Congress did not modify Section 1621, and in context the omission is pointed.

he received the benefits extended by Section 1621: the requirement of proof of falsity and the protection of the "two-witness" rule. See Pet. App. 40.

In any event, the recantation defense of Section 1623 would not have assisted petitioner. The recantation provision is addressed to the court and not to the jury (*United States* v. *Kahn, supra,* 472 F. 2d at 283 n. 9), and in the circumstances of this case the district court would have been required to find, as the court of appeals did, that petitioner recanted only after his perjury had been exposed (Pet. App. 43):

> [I]t is clear from the record that §1623(d) would not have precluded prosecution of [petitioner] for perjury. When [petitioner] made admissions concerning his conversations and transactions with Harvey Wish it had become "manifest that such falsity" had been exposed. His changed testimony came after he had heard transcripts of the testimony of two eyewitnesses to a previous transaction which he had categorically denied in his earlier testimony.

Petitioner acknowledges (Pet. 11) that this is a "difficult hurdle" to overcome. It is more than difficult. It is insuperable.

Finally, we point out, as did the court of appeals (Pet. App. 42-43), that petitioner did not raise prior to trial any objection to proceeding under Section 1621 rather than Section 1623. He consequently may not raise the contention belatedly. Fed. R. Crim. P. 12(f); cf. *Davis* v. *United States,* 411 U.S. 233.

2. Petitioner's contention (Pet. 13-18) that unconstitutional preaccusation delay took place in this case is insubstantial. Petitioner measures the delay by the lapse between October 1972, when the Supreme Court of Michigan granted Whalen leave to appeal, and July 1975, when

he was indicted. But whatever merit this argument might have had if petitioner had been convicted of a substantive offense, he was not so convicted. He was convicted only of perjury. The perjury took place on May 19, 1975, the indictment followed on July 3, 1975, and the trial began on October 20, 1975. The preaccusation delay was less than two months.[4]

3. Petitioner objects to the admission under Fed. R. Evid. 801(d)(2) of tape recordings of conversations between Wish and Whalen. Petitioner's arguments are unpersuasive. The longstanding federal rule permitting the admission of statements made by co-conspirators in the course of a conspiracy does not violate the Confrontation Clause (see *Dutton* v. *Evans,* 400 U.S. 74, 80-82; *United States* v. *Shaffer,* 520 F. 2d 1369 (C.A. 3), certiorari denied *sub nom. Vespe* v. *United States,* 423 U.S. 1051), and the tape recordings at issue here fell within that exception.

There was ample non-hearsay evidence to link petitioner to a conspiracy with Whalen and Wish. The evidence

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[4]There is no need to hold this case pending the Court's disposition of *United States* v. *Lovasco,* No. 75-1844, argued March 21 and 22, 1977. In *Lovasco* there was a delay of 18 months between the offense and the indictment (compared to six weeks in this case). The district court and court of appeals found the delay to be unreasonable, and the question presented to this Court was whether, in such circumstances, a defendant must show both prejudice because of the delay and that the prosecution delayed intentionally for the purpose of obtaining a tactical advantage in order to secure a dismissal of the indictment. Petitioner has shown neither unreasonable delay, invidious motivation, nor prejudice. Petitioner's only claim of prejudice has to do with the death of the former Chief Justice of the Supreme Court of Michigan. As the court of appeals explained, however, the Chief Justice's testimony would have pertained only to the substantive counts (Pet. App. 44). Moreover, petitioner has not alleged that the delay between May 19 and July 3, 1975, was designed to, or did, achieve a tactical advantage.

showed that petitioner was responsible for the *sua sponte* grant of leave for an appeal in Whalen's case, as well as for the granting of bail. He admitted that he had discussed Whalen's case with Wish on at least two occasions. This evidence was enough to allow the conspiracy charge to be presented to the jury, and it was therefore sufficient, under any standard, to allow the admission of hearsay statements by co-conspirators.

Petitioner contends that Whalen was not a co-conspirator because he had been acting as an informant (Pet. 21-23). But Whalen's role as an informant could not have affected Wish's status as a co-conspirator. That still would have left a two-person conspiracy. Moreover, it was Wish's side of the conversations that damaged petitioner, since it was Wish who was carrying out the bribery scheme.[5]

Petitioner also contends that some of the conversations occurred after the conspiracy had terminated (Pet. 23-24). In procuring leave for an appeal and bail, however, the conspirators had accomplished only part of their objective. An appeal would have been of little benefit to Whalen if his conviction had not been reversed. The conspiracy therefore continued at least until October 1973, when Whalen's case was argued. The only later conversation admitted into evidence was a January 10, 1974, discussion between Wish and Whalen (App. 474a-477a) about the effect of the reversal of Whalen's conviction and whether the State would retry him. The conversation did not add

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[5]The evidence showed, moreover, that Whalen went to the F.B.I. following his first conversation with Wish about the bribery scheme (App. 508a). Thus, the record supports a finding that Whalen became an informant after he had become a conspirator. The fact that Whalen became an informant during the course of the conspiracy did not render Wish's statements inadmissible. See *United States* v. *DeSapio*, 435 F. 2d 272, 282 (C.A. 2), certiorari denied, 402 U.S. 999.

anything to the evidence of petitioner's involvement in the bribery scheme. Even if erroneous, its admission was harmless error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1977.

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*The Solicitor General is disqualified in this case.